UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ELIZABETH GUANZON RETUYA
a/k/a ELIZABETH DRUMMOND-RETUYA

Plaintiff,

v. CASE NO. 8:08-cv-00935-T-17MSS

MICHAEL CHERTOFF, et al.,

Defendants.
_____/

DEFENDANTS' MOTION TO DISMISS

Defendants, by and through the undersigned Assistant United States Attorney, move pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss Plaintiff's complaint, and state the following in support.

FACTS

1. Plaintiff was born on February 14, 1969, to an unmarried mother in the Philippines, and is a citizen and resident of that country. Complaint, ¶¶ 1, 45, 47. Plaintiff turned 21 on February 14, 1990.

2. In 2006, Plaintiff filed an application for citizenship on the basis that she is the daughter of Charles Drummond, a United States citizen. Complaint, ¶ 58.

3. Drummond was a legal resident of West Virginia at the time of Plaintiff's birth until July 31, 1981, and a legal resident of Florida from July 31, 1981 through the present, including at the time when Plaintiff turned 21. Complaint, ¶ 60. He also resided for a brief period in Ohio but did not establish legal residency there. Id.

4. In August 2006, the United States Embassy in Manila, Philippines requested from Plaintiff additional documents to complete the processing of her

application. Complaint, ¶ 59. Specifically, the embassy requested "proof of father's legal residence/domicile in the U.S. (aside from West Virginia, Ohio and Florida) after [Plaintiff's] birth and prior to 21st birthday." Id., Ex. A. The request did not set forth any findings with respect to whether Plaintiff had demonstrated a blood relationship with Drummond and indicated that she had not yet established her eligibility to be deemed a United States citizen. See id.

5. Drummond sought further clarification of this request through one of his congressional representatives. Complaint, ¶ 62. In response, the embassy explained that to acquire citizenship at birth as a person born out of wedlock outside of the United States, Plaintiff needed to show (1) a blood relationship between herself and Drummond, and (2) that she was legitimated under the law of her residence or Drummond's residence before she turned 21. Because Plaintiff had not shown that she had been legitimated under the laws of Florida and West Virginia, the embassy requested that Plaintiff provide proof that Drummond had resided in any other state. Id., Ex. B.

6. Further, Plaintiff's birth certificate did not list Drummond as her father, and the embassy explained that she needed to submit additional evidence to establish a biological relationship between the two. Complaint, Ex. B. The embassy suggested that Plaintiff and her father defer undergoing DNA testing to establish the biological relationship until the legitimation issue was resolved. Id.

7. Plaintiff filed a Petition for Determination of Paternity in the Thirteenth Judicial Circuit Court for Hillsborough County, Florida. Complaint, ¶ 65. On January

31, 2007, the circuit court entered a Final Judgment of Paternity, finding that Drummond is Plaintiff's "natural, legitimate and biological father." Id., ¶ 66 & Ex. C.

8. Plaintiff, in turn, provided the judgment to the embassy in Manila as proof of legitimation. Complaint, ¶ 67. On February 6, 2007, the embassy issued a denial of Plaintiff's citizenship application on the grounds that she was "not legitimated under United States or Philippine law, while [she was] below 21 years old." Id., ¶ 68 & Ex. D.

9. Plaintiff and Drummond entered into a stipulation stating in pertinent part that "the parties agree that for purposes of legitimation of [Plaintiff] retroactive to July 31, 1981, that [Drummond] is the natural, legitimate and biological father of [Plaintiff]." Complaint, ¶ 71 & Ex. E. On September 26, 2007, the circuit court ratified the stipulation as a modification to its original paternity order. Id.

10. In October 2007, Plaintiff provided the stipulation and ratifying order to the embassy. Complaint, ¶ 72. On October 23, 2007, the embassy reaffirmed its denial of Plaintiff's application, stating that the stipulation was insufficient because "the legitimating act, in this case the adjudication of paternity, must have been adjudicated before the age of 21." Id., ¶ 73 & Ex. F.

11. Plaintiff entered into a second stipulation with Drummond, which stated in pertinent part that

> [t]he parties agree that [Drummond] did acknowledge in writing that he is the father of [Plaintiff] both prior to and shortly after [Plaintiff's] birth, and that the paternity of [Plaintiff] was therefore established in fact by legitimation by the State of Florida when [Drummond] became a resident of Florida on July 31, 1981 * * * Accordingly, [Plaintiff] was in fact legitimated under Florida Statutes upon [Drummond] becoming a resident of the State of Florida on July 31, 1981.

Complaint, ¶ 76 & Ex. G. On December 5, 2007, the circuit court ratified the stipulation as a further modification of its original paternity order. Id.[1]

12. Plaintiff provided the stipulation and ratifying order to the Manila embassy. Complaint, ¶ 77. On February 5, 2008, the embassy again reaffirmed its denial of Plaintiff's application, stating that "[b]ased on the documents you submitted and our recent conversation with you and your father, the Embassy determined that you do not have a valid claim to derivative citizenship because . . . [y]ou were not legitimated under United States or Philippine law, while you were below 21 years old." Id., ¶ 78 & Ex. H.

13. On May 14, 2008, Plaintiff filed this action, alleging that Defendants, in denying her citizenship application, had acted unreasonably and violated her rights to due process and equal protection under the Fifth Amendment. See generally Complaint, ¶¶ 81-95.

DISCUSSION

At issue is whether Plaintiff can be deemed a United States citizen by virtue of the judgment of paternity entered by a Florida state court in 2007, when she was 36 years of age, which the parties stipulated took effect on July 31, 1981. The short answer is no. Plaintiff puts forth three theories to argue otherwise, all of which fail. Plaintiff first argues that the 2007 adjudication of paternity satisfies the Immigration and Nationality Act's (INA) requirements for transmitting citizenship to an out of wedlock child born abroad. However, the judgment was not an act of legitimation

[1]The written acknowledgment of paternity referred to in the stipulation is not included in the exhibits to Plaintiff's complaint.

under Florida law, and, even if it was, it did not occur before Plaintiff turned 21, as required by the INA's plain language.

Plaintiff further argues that the embassy's denial of her application was unreasonable and entitles her to the extraordinary remedy of a writ of mandamus. This claim fails on the same grounds as the legitimation claim. Because Plaintiff was not legitimated while under 21, she has no right to a declaration of citizenship and Defendants have no legal duty to grant her that status.

Finally, Plaintiff asserts without explanation that the denial violated her equal protection and due process rights under the Fifth Amendment. The Supreme Court, however, has held that the INA's legitimation requirement does not violate the right to equal protection of the laws. Moreover, Plaintiff has no due process right in a claim to citizenship. Persons born outside the United States may acquire citizenship only as prescribed by Acts of Congress, and Plaintiff cannot employ the due process clause to circumvent the Congressionally-prescribed citizenship requirements for out of wedlock children born overseas.

I. No Claim Under the INA

Plaintiff cites two general provisions to invoke the Court's jurisdiction – the Mandamus Act and the federal question statute, see Complaint, ¶ 3 – but not the specific statute that provides for obtaining a declaration of United States citizenship, 8 U.S.C. § 1503. Because it is "well-settled that general grants of jurisdiction may not be relied upon to expand a very specific statute that either grants or limits jurisdiction," the analytical starting point should be § 1503(a). Eldeeb v. Chertoff, No. 8:07-cv-236-T-17EAJ, 2007 WL 2209231, at *18 (M.D. Fla. July 30, 2007).

8 U.S.C. § 1503 prescribes two different avenues of judicial review for obtaining a declaration of citizenship, depending on whether the person is within the United States. A person within the United States whose citizenship claim is denied "may institute an action under the provisions of section 2201 of Title 28 [the Declaratory Judgment Act] . . . for a judgment declaring him to be a national of the United States." Id., § 1503(a). A person outside the United States, on the other hand, must first apply to a diplomatic or consular officer of the United States for a "certificate of identity" that would allow him to travel to a United States port of entry and apply for admission. If admission is denied, the person's sole recourse is to file a petition for writ of *habeas corpus*. Id., §§ 1503(b), (c).

Notwithstanding § 1503(b)'s clear language, courts have relied on § 1503(a)'s procedure as the vehicle for anyone challenging the denial of a citizenship claim, regardless of whether the person is in the United States. Rusk v. Cort, 369 U.S. 367, 379 (1962). Rusk involved a putative United States citizen (Cort) residing in the former Czechoslovakia whose application for an American passport was denied on the grounds that he had forfeited his citizenship by evading the draft. Id. at 369. Cort filed a declaratory judgment action in federal district court, which the government moved to dismiss on the grounds that §§ 1503(b) and (c) provided the exclusive procedure under which Cort could attack the administrative determination that he was not a citizen. The district court denied the motion, holding that it had jurisdiction under the Declaratory Judgment Act and the Administrative Procedure Act (APA). Id. at 370.

The Supreme Court affirmed, expressing doubt that "despite the liberal provisions of the [APA], Congress intended that a native of this country living abroad must travel thousands of miles, be arrested, and go to jail in order to attack an

administrative finding that he was not a citizen of the United States." Id. at 375. Fifteen years later, the Court narrowed the APA's jurisdictional scope, holding that it does not independently confer jurisdiction to review agency action, but instead merely prescribes how that jurisdiction may be exercised once conferred by some other statute. Califano v. Sanders, 430 U.S. 99, 105, 107 (1977). The procedure prescribed in Rusk, however, continues to have currency when a person outside the United States has had his citizenship claim denied. See Kahane v. Secretary of State, 700 F. Supp. 1162, 1165, n.3 (D.D.C. 1988); Icaza v. Schultz, 656 F. Supp. 819, 822, n.5 ("Although § 1503(a) refers to a person 'within the United States,' the Supreme Court has extended the benefit of the § 1503(a) declaratory judgment procedure to persons outside the United States as well."); see also Bensky v. Powell, 391 F.3d 894, 896-97 (7th Cir. 2004). In light of the existing case law, therefore, Defendants do not object to Plaintiff's action being heard by the Court as a declaratory judgment proceeding brought under § 1503(a).[2]

Section 1503(a) and the Declaratory Judgment Act are procedural vehicles and do not provide the rule of decision for review of Plaintiff's denied citizenship claim. That rule is contained in 8 U.S.C. § 1409(a). The version of § 1409(a) that controls in this case, commonly referred to as "old" § 1409(a), provides that a child born out of wedlock outside the United States to a father who is a United States citizen shall likewise be deemed a citizen "if the paternity of such child is established ***while*** such

[2]A further complication for Plaintiff is that § 1503(b)'s availability is limited to a person "who at some time prior to his application . . .has been physically present in the United States, or to person under sixteen years of age who was born abroad of a United States citizen parent." At least one court, however, has applied § 1503(a) to a person in the same circumstances as Plaintiff. Icaza, 656 F. Supp. at 820-21 (plaintiff was born in the Republic of Panama and had not been physically present in United States prior to applying for certificate of citizenship).

child is under the age of twenty-one years by legitimation." 8 U.S.C. § 1409(a) (1985) (amended by the Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, 100 Stat. 3655 (1986) (emphasis added).[3]

Plaintiff asserts that (1) she satisfied the legitimation requirement (2) before turning 21. She is wrong on both counts. Under Florida law in 1981, the year her father moved to Florida, the sole act that could legitimate a child born out of wedlock for all purposes was the marriage of the parents. Fla. Stat. § 742.091 (1981).[4] Upon

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[3]The 1986 amendments changed the citizenship requirements for an out of wedlock child born abroad to a citizen father as follows:

> (1) a blood relationship between the person and the father is established by clear and convincing evidence,
>
> (2) the father had the nationality of the United States at the time of the person's birth,
>
> (3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
>
> (4) while the person is under the age of 18 years –
>
> > (A) the person is legitimated under the law of the person's residence or domicile,
> >
> > (B) the father acknowledges paternity of the person in writing under oath, or
> >
> > (C) the paternity of the person is established by adjudication of a competent court.

Pub. L. No. 99-653, § 13(a), 100 Stat. 3655. Congress further provided that "an individual who is at least 15 years of age, but under 18 years of age as of the date of enactment of this Act may elect to have the old section 309(a) apply to the individual instead of the new section 309(a)." Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, §8(r), 102 Stat. 2609 (1988). Plaintiff here seeks to proceed under old § 1409(a). Complaint, ¶¶ 24, 27.

[4]Prior to enactment of the current version of § 1409(a), which bases legitimation on the law of the child's domicile or residence, the INA provided that legitimation was determined by the law of the domicile of either the child or the parent. 8 U.S.C. § 1101(c)(1) (defining child to include "a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in the United States or elsewhere."). Plaintiff alleges that her father was a legal resident of West Virginia when she was born until 1981, when he moved to Florida, where he has since resided. He also allegedly resided in Ohio for a brief period. Complaint, ¶ 60. Plaintiff resides in the Philippines. Id., ¶ 6.

marrying of the putative parents, the child "in all respects [was] deemed and held legitimate." Id. Plaintiff acknowledges that her mother and Drummond never married, Complaint, ¶ 45, and therefore she cannot claim legitimation under Florida law.[5]

Plaintiff instead relies on an adjudication of a petition for paternity filed under Fla. Stat. § 742.011. Complaint, ¶¶ 87-88 & Ex. C ("This cause came before the Court upon a Petition to Determine Paternity under chapter 742, Florida Statutes.").[6] An adjudication of paternity under § 742.011, however, is narrower in scope than an act of legitimation. The former's purpose is to provide the basis for a court to order child support from a man adjudicated to be the father and relieve the public from providing such support. Kendrick v. Everheart, 390 So.2d 53, 56 (Fla. 1980). Legitimation through marriage of the parents, on the other hand, confers on the child the status "in all respects" equal to that of a child born in wedlock. Knauer v. Barnett, 360 So.2d 399, 403-04 (Fla. 1978).[7]

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[5]Marriage of the parents was likewise a requirement for legitimation under the laws of West Virginia, Ohio and the Philippines, and Plaintiff therefore cannot claim to have been legitimated in any of those jurisdictions. W. Va. Code § 42-1-6; Ohio Rev. Code § 2105.18; Phil. Civ. Code art. 178. Even if an adjudication of paternity for specified purposes had been available in West Virginia and Ohio during the relevant time period, Plaintiff does not allege that such a proceeding occurred in either state.

[6]Fla. Stat. § 742.011 provides that "[a]ny woman who is pregnant or has a child, any man who has reason to believe that he is the father of a child, or any child may bring proceedings in the circuit court, in chancery, to determine the paternity of the child when paternity has not been established by law or otherwise."

[7]Florida law also provides for the establishment of paternity for intestacy purposes. Fla. Stat. § 732.108. Plaintiff has not petitioned for an adjudication of paternity under this provision; indeed, her father is still alive. Florida's intestacy statute is therefore irrelevant to this proceeding. It allows a written acknowledgment of paternity *for purposes of intestate succession,* which makes sense when the father is deceased and a written acknowledgment may be all that is available, but the statute is wholly inapposite in the context of a federal citizenship statute requiring legitimation *during the minority* of the child. Admittedly, the Department refers to the intestacy statute in its non-binding general guidance to consular officers. See 7 Foreign Affairs Manual (FAM) 1133-4.2, available at

(continued...)

But even if Plaintiff's adjudication of paternity was tantamount to legitimation, it did not occur until well after Plaintiff turned 21. Because § 1409(a)'s plain language requires a person to be legitimated before turning 21 in order to be deemed a citizen, Plaintiff is ineligible for citizenship under § 1409(a) and her claim for "unreasonable denial" of her application fails. Oblong v. Reno, 52 F.3d 801, 803 (9th Cir. 1995) ("The [INA] thus requires that a child born abroad and out of wedlock to a United States citizen father and an alien mother establish paternity ***by the age of majority*** in order to be deemed a United States citizen."); O'Donovan-Conlin v. Dep't of State, 255 F. Supp.2d 1075, 1081 (N.D. Cal. 2003) ("By virtue of the . . . marriage of his parents [when he was 11], plaintiff . . . has been legitimated ***while he was under 18 years of age***, thus fulfilling the requirement of 8 U.S.C. § 1409(a)"); Rios v. Civiletti, 571 F. Supp. 218, 223 (D.P.R. 1983) ("The acknowledgment of [the plaintiff] by both of her parents . . . ***during her minority*** makes her a legitimate child . . . and entitles her to United States citizenship."); see Tuan Ahn Nguyen v. INS, 533 U.S. 53, 61 (2001) (noting that current § 1409(a)(4), relating to act of legitimation, "requires certain conduct to occur ***before*** the child . . . reaches 18 years of age") (emphases added).

The Supreme Court in Tuan Ahn Nguyen underscored the purpose behind the statutory requirement for legitimation during minority. The Court found it important that an out of wedlock child born abroad should have meaningful ties with her citizen father, in addition to a biological relationship. 533 U.S. at 65. As the Court explained: "it

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[7](...continued)
http://www.state.gov/documents/organization/86757.pdf. However, due to the difficulty surrounding the interpretation of state legitimation laws, the guidance also directs consular officers to confirm the accuracy of a particular state statute with the Department of State before relying upon that statute in determining whether a person was legitimated.

should be unsurprising that Congress decided to require [through legitimation] that an opportunity for a parent-child relationship occur during the formative years of the child's minority." Id. at 68. In short, establishing a legal relationship with one's father at the age of 37, as is the case with Plaintiff here, does not satisfy either § 1409(a)'s express text or underlying rationale.[8]

II. No Claim under the Mandamus Act

"Mandamus is an extraordinary remedy which should be utilized only in the clearest and most compelling of cases." Zahani v. Neufeld, No. 6:05-cv-1857-Orl-18J, 2007 WL 2246211, at *2 (M.D. Fla. June 26, 2006) (quoting Cash v. Barnhart, 327 F.3d 1252, 1257 (11th Cir. 2003)). It is "only appropriate when (1) the plaintiff has a clear right to the relief requested; (2) the defendant has a clear duty to act; and (3) no other adequate remedy is available." Id. Plaintiff's mandamus claim fails here because, as explained above, she has no right to a declaration of citizenship and Defendants have no duty to provide it.

Plaintiff's demand for a passport, see Complaint, Prayer for Relief, § B.ix., likewise fails. Mandamus is unavailable to review the denial of Plaintiff's passport application not only because these documents may only be issued to United States nationals, 22 U.S.C. § 212, but because passport issuance is a discretionary function exclusively reserved to the Executive Branch. Haig v. Agee, 453 U.S. 280, 293 (1981); see Perkins v. Elg, 307 U.S. 325 (1939) (noting unavailability of mandamus to interfere with Department of State's discretion to issue a passport to U.S. citizen).

[8]In any event, the United States Ambassador to the Philippines should be dismissed as an improper defendant because an action under 8 U.S.C. § 1503(a) may be brought only "against the head of such department or independent agency."

III. No Claim under the Fifth Amendment

Plaintiff asserts that the denial of her citizenship application violated her Fifth Amendment rights to equal protection and due process. Complaint, ¶ 95. It is not clear how because Plaintiff does not elaborate her theory. But what is clear is that the Supreme Court has held that § 1409's differing requirements for obtaining citizenship, depending on whether the citizen parent is the mother or father, does not violate the Fifth Amendment's guarantee of equal protection.[9] Tuan Ahn Nguyen, 533 U.S. at 71 (holding that differing requirements of transmitting citizenship under § 1409 were substantially related to important government objectives of guaranteeing that a biological relationship exists between citizen parent and child, and forging a *bona fide* relationship between them).

It is equally clear that Plaintiff has no due process right in a claim to citizenship. Rios-Valenzuela v. Dep't of Homeland Security, 506 F.3d 393, 400-01 (5th Cir. 2007) (finding no due process right to judicial review of stand alone claim of citizenship). To allow otherwise contravenes the constitutional principle that "[p]ersons not born in the United States acquire citizenship by birth only as provided by Acts of Congress." Miller

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[9]When the citizen parent of an out of wedlock child born abroad is the mother,

> the child shall be held to have acquired at birth the nationality status of his mother if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

8 U.S.C. § 1409©. Thus unlike when a citizen father is involved under "old" § 1409(a), no act of legitimation is required. Moreover, the current version of § 1409(a) requires a host of affirmative steps not required if the citizen parent is the mother: establishment of a blood relationship by clear and convincing evidence; a written agreement to financially support the child until she turns 18; and either legitimation, a declaration of paternity under oath by the father, or a court order of paternity.

v. Albright, 523 U.S. 420, 424 (1998) (citing United States v. Wong Kim Ark, 169 U.S. 649, 703 (1898)); U.S. Const., art. I, § 8, cl. 4 ("The Congress shall have Power . . . To establish an [sic] uniform Rule of Naturalization"). Even if a court could unilaterally provide a path to citizenship to an alien via the Fifth Amendment, Plaintiff has not pointed to any deprivation of "life, liberty, or property . . . upon which to anchor [her] due process claim." Rios-Valenzuela, 506 F.3d at 401. Plaintiff alleges that her mother's grave is in California, and that several half-siblings, as well as her father, reside in the United States. Complaint, ¶¶ 6, 51-53. These facts, without more, do not vest Plaintiff with a due process right to enter the United States, much less to be declared a citizen. See American Immigration Lawyers Ass'n v. Reno, 18 F. Supp.2d 38, 59-60 (D.D.C. 1998) (finding no due process right implicated where plaintiff was not allowed entry into United States to visit daughter and grandchild).[10]

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[10]The failure of Plaintiff's lawsuit does not leave her without alternative paths to citizenship. She may be eligible to be a beneficiary of a petition for an immigrant visa and lawful permanent resident status as an adult daughter of a United States citizen provided that Plaintiff was once a "child" as defined by the INA. See 8 U.S.C. § 1101(b)(1)(D). Or Drummond's spouse could file an immigrant visa petition as Plaintiff's step-parent provided that the marital relationship existed before Plaintiff turned 18. Id., § 1101(b)(1)(B). To be sure, even if Plaintiff could establish the above legal grounds for a visa, as a Philippine national, she would face a significant waiting period. Department of State Visa Bulletin (Aug. 2008) http://travel.state.gov/visa/frvi/bulletin/bulletin_4310.html (noting 15 year wait for adult sons and daughters from the Philippines). But these hurdles, no matter how high they may appear to Plaintiff, are of no moment to this action. See Rios-Valenzuela, 506 F.3d at 401 (rejecting due process claim although plaintiff "does not have an easy avenue before which he might bring his citizenship before the courts, but we do perceive avenues by which he might do so.").

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiff's complaint for failure to state a claim upon which relief can be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2008, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, and a copy of same along with the notice of electronic filing by first class U.S. mail, postage prepaid, to the following:

Elizabeth Guanzon Retuya
c/o Charles J. Drummond, her father and representative
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Brandon, FL 33510

s/ Javier M. Guzman
Javier M. Guzman
Assistant United States Attorney